Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
UTEX Communications Corp.,	)	WC Docket No. 09-134
Renewed Petition for Preemption	)	

COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (Qwest) hereby submits these comments in the above-captioned proceeding in response to the Public Notice of the Federal Communications Commission (Commission).[1]

Qwest does not address the merits of UTEX's petition, but rather reiterates its prior requests in a variety of proceedings that the Commission act to address issues in connection with the intercarrier compensation (ICC) treatment of Voice over Internet Protocol (VoIP) traffic -- namely, the proper ICC treatment of VoIP traffic on the Public Switched Telephone Network (PSTN). This proceeding further evidences the need for the Commission to act in an expedited manner on these issues. The current potential for carriers to avoid access charges based on a proclaimed lack of clarity only advantages bad actors. Qwest recently addressed these issues in comments filed in response to the Global NAPs Petition for Declaratory Ruling and Alternative

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[1] *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, Pleading Cycle Established for Comments on UTEX Communications Corporation's Renewed Petition for Preemption of the Jurisdiction of the Public Utility Commission of Texas Pursuant to Section 252(e) of the Communications Act, WC Docket No. 09-134, DA 10-1398 (rel. July 28, 2010).

Petition for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions and appends a copy of those comments hereto as Attachment A.[2]

Respectfully submitted,

By: /s/ Timothy M. Boucher
Craig J. Brown
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005
303-383-6608
craig.brown@qwest.com
timothy.boucher@qwest.com

Attorneys for Qwest Communications International Inc.

August 12, 2010

[2] The Qwest Comments were submitted on April 2, 2010 in WC Docket No. 10-60.

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Global NAPs Petition for Declaratory Ruling	)	WC Docket No. 10-60
and Alternative Petition for Preemption of the	)	
Pennsylvania, New Hampshire and Maryland	)	
State Commissions	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Craig J. Brown
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6608

Attorneys for
QWEST COMMUNICATIONS
INTERNATIONAL INC.

April 2, 2010

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State Commissions	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (QCII), on behalf of its affiliates Qwest Communications Company, LLC (QCC), Qwest LD Corporation (QLDC) and Qwest Corporation (QC) [hereafter referred to jointly as Qwest],[1] hereby files these comments in connection with the Petition for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commissions filed by Global NAPS (Global NAPS Petition or Petition).[2]

I. INTRODUCTION AND SUMMARY

The Global NAPS Petition presents issues critical to a particular flavor of what has come to be labeled as "phantom traffic." Indeed, the Petition appears to seek to legitimize one of the more prevalent problem traffic scenarios, where interexchange traffic that is subject by rule and tariff to tariffed access charges is improperly diverted into the local exchange network in a manner inconsistent with the LEC's tariffs. Because multiple carriers are involved in these

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[1] QCC is an interexchange carrier (or IXC) and provides intraLATA and interLATA long distance service; QLDC is a reseller of both intraLATA and interLATA long distance service; and QC is the local exchange carrier (LEC) subsidiary of QCII and also provides intraLATA long distance service.

[2] Petition for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commission, filed Mar. 5, 2010 by Global NAPS, Inc., Global NAPs Pennsylvania, Inc., Global NAPs South, Inc. and other Global NAPs affiliates. Public Notice, DA 10-461, rel. Mar. 18, 2010.

traffic flows, disputes often arise as to which entity or entities are liable to the terminating LEC for the access charges. The Global NAPS Petition also potentially presents a subset of the various issues that the Commission must address regarding the intercarrier compensation (ICC) treatment of Voice over Internet Protocol (VoIP) traffic -- namely, the proper ICC treatment of VoIP traffic on the Public Switched Telephone Network (PSTN) [hereafter referred to as VoIP/PSTN traffic].

Because the Petition only raises a subset of the phantom traffic and VoIP ICC issues the Commission intends to address in a separate proceeding in the near future, it would be better served by dealing with them in that proceeding.

Additionally, at least some of what Global NAPS calls VoIP traffic is not, in fact, true VoIP traffic. This is, alone, grounds for denial of the Petition.

The Global NAPS Petition also misstates current law regarding the proper ICC treatment of VoIP/PSTN traffic for access charge purposes, the access charge liability rules in multi-carrier traffic flows, and the Commission's preemption rulings with respect to VoIP.

For all these reasons, the Commission should deny the Petition. In the alternative, the Commission should issue declaratory rulings: (1) establishing that VoIP/PSTN traffic is to be treated like all other traffic on the PSTN or, in the alternative, clarifying the correct ICC treatment of VoIP/PSTN traffic under the ESP Exemption consistent with these comments; and (2) clarifying the access charge liability rules for multi-carrier traffic scenarios like that at issue here consistent with the discussion below and the previously-filed Qwest comments attached hereto as **Appendix A**.

In all events, the Commission should act in an expedited manner on these issues as the current potential for carriers to avoid access charges based on a proclaimed lack of clarity only advantages bad actors.

II. ARGUMENT

A. The Commission Should Address The Issues Presented By The Petition In Its Planned Separate Proceeding On Phantom Traffic And VoIP ICC Issues

Phantom traffic describes a number of situations in which the traffic is delivered to a terminating carrier in a manner that makes impossible the billing of access charges.[3] This proceeding involves one flavor of the phantom traffic phenomenon where interexchange traffic that is subject by rule and tariff to tariffed access charges is improperly diverted into the local services network, access charges are not paid and the fact that multiple carriers are involved gives rise to a dispute about which entity or entities are liable to the terminating LEC for the access charges. In the particular scenario presented by the Petition, the improper "diversion" happens because the last wholesale provider transporting the access traffic is pretending to be an

[3] Phantom traffic includes such scenarios as terminating access traffic that has been erroneously designated as interstate when in fact it is jurisdictionally intrastate or has been erroneously designed as end-user traffic and diverted improperly into the local exchange network over local interconnection facilities. Qwest has previously outlined the four steps the Commission should take immediately to deal with the broader aspects of the phantom traffic problem: (1) clarify that originating carriers may not lawfully conceal or alter any identifying information in a call that permits proper billing; (2) clarify that transit carriers are not liable to terminating carriers for third-party originated traffic they deliver; (3) clarify that the jurisdiction of any call is based on the end-points of the call -- in the case of an end user to end-user call, the end-points are the locations of the called and calling parties and, in the case of an end user to or from Information Service Provider (ISP) call (including IP voice), the end-points of the call are the calling(ed) party and the ISP point of presence (POP) (this is consistent with a proper interpretation of the "ESP Exemption," which simply treats an ISP/ESP POP as an end-user premise for access charge purposes); and (4) clarify that efforts by carriers to avoid access charges by including "information" or "processing" in their long distance calls in a manner that does not meet the strict tests for an information/enhanced service under the *Computer Inquiry II* rules are not compliant with the law and expose such carriers to, among other things, disconnection by injured LECs. Qwest uses the term "ISP" here to refer to information service providers who originate VoIP/PSTN traffic.

end user (*i.e.*, claiming to be an ESP for the common carrier service it provides) and terminates the call to the ILEC over local trunks (either directly or through a CLEC). Often the carriers involved contend, as Global NAPS apparently does here, that the traffic involved is exempt from access charges under the ESP Exemption because it is VoIP traffic. As discussed in Section II.B below, Qwest's experience suggests that the traffic is not, at least in all cases, true VoIP traffic. These parties also misinterpret the application of the ESP Exemption to the VoIP traffic on the PSTN as discussed in Section II.C below. Regardless, the regulatory issues presented by this traffic flow have been thoroughly briefed through voluminous comments and *ex partes* in the Commission's *Intercarrier Compensation* proceeding and in prior proceedings that sought relief similar to that sought by Global NAPS here.[4] As part of that record, Qwest and other parties have demonstrated both the fallacies underlying the Global NAPS factual and legal contentions and the urgent need for the Commission to take immediate action with respect to "phantom" access traffic issues like the traffic scenario at issue here.[5] Recognizing this urgency, the recently released National Broadband Plan states that the Commission intends to deal with

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[4] *See, e.g., In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001); Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005). *And see, In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services,* Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475 (2008). *See also*, Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276, filed Sept. 19, 2005 (correction filed Sept. 21, 2005); VarTec Telecom, Inc. Petition for Declaratory Ruling, WC Docket No. 05-276, filed Aug. 20, 2004 (VarTec Petition).

[5] *See, e.g.,* Qwest *ex partes* on Phantom Traffic, CC Docket No. 01-92, dated Sept. 8, 2005 and Sept. 29, 2005. *See also*, Comments of Qwest Communications International Inc., WC Docket No. 05-276, filed Nov. 10, 2005; Reply Comments of Qwest Communications International Inc., WC Docket No. 05-276, filed Dec. 12, 2005; Comments of Qwest Communications International Inc., WC Docket Nos. 05-337, *et al.*, filed Nov. 26, 2008; Reply Comments of Qwest Communications International Inc., WC Docket Nos. 05-337, *et al.*, filed Dec. 22, 2008.

phantom traffic and the ICC treatment of VoIP (together with access stimulation) on an expedited basis in a separate proceeding in the near future.[6] Because the Global NAPS Petition only raises a subset of the phantom traffic and VoIP ICC issues the Commission intends to address in that proceeding, it would be better served by dealing with them in that proceeding.

B. At Least Some Of The Traffic At Issue In The Petition Is Non-VoIP Traffic

In the Petition, Global NAPS seeks certain declaratory rulings with respect to what it describes as "Voice over Internet Protocol ("VoIP") traffic terminated to end users of interconnected LECs through Global."[7] It has been Qwest's experience that what Global NAPS and other similarly situated carriers have called VoIP traffic is, in fact, not true VoIP traffic. Rather, it often includes IP-in-the-middle traffic and traditional TDM traffic disguised as VoIP. With respect to the former, the Commission has previously determined it to be telecommunications traffic just like traditional TDM traffic as it is simply traffic that originates and terminates in TDM on the PSTN but is carried in IP protocol at some point in its traffic flow.[8] Global NAPS fails to state with any clarity what precise services or traffic would be covered by the requested rulings. As a result, it also potentially encompasses traffic which is not true VoIP on the PSTN traffic and should be denied for that reason alone. Similarly, it will be critical that any eventual Commission action addressing the issues raised here include a precise definition of true VoIP services.

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[6] *See* National Broadband Plan, Connecting America, Chapter 8 - Availability, Intercarrier Compensation.

[7] Petition at 1.

[8] *See In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) (*IP-in-the-Middle Ruling*).

C. The Petition Misstates Current Law Regarding The ESP Exemption

Even if the Petition were limited to true VoIP traffic, it misstates current law regarding the ESP Exemption and its application to VoIP/PSTN traffic. Specifically, Global NAPS contends throughout the Petition that all VoIP traffic, including VoIP/PSTN traffic, is always exempt from access charges.[9] Global NAPS is wrong as a matter of law. As Qwest and others have previously demonstrated, the Commission should clarify that true VoIP, including VoIP/PSTN traffic, is an information service.[10] And, that being the case, the ICC treatment of VoIP/PSTN traffic is determined by the correct application of the ESP Exemption. The correct application of the ESP Exemption dictates that the ICC treatment of VoIP/PSTN traffic (*e.g.* whether access or reciprocal compensation charges apply) depends on where the VoIP ISP's[11] POP is located. On the other hand, Qwest recognizes that, while this is the best reading of the application of the ESP Exemption in this context, it makes no sense to treat VoIP/PSTN traffic any differently than any other traffic on the PSTN as a policy matter. Accordingly, Qwest has previously encouraged the Commission to ensure that VoIP/PSTN traffic receives identical treatment as all other traffic by either ruling that its ESP Exemption does not apply to such traffic or by, as Qwest has proposed, forbearing from the application of the ESP Exemption to this traffic -- either of which would be change of law rulings.[12] If it does so, it will also be critical that the Commission clarify consistent with the discussion below how jurisdictionalization of

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[9] *See, e.g.*, Petition at 9, 20-23, 30-31.

[10] *See, e.g.,* Comments on Petitions for Reconsideration of Qwest Communications International Inc., CC Docket Nos. 02-33, 95-20 and 98-10, filed Dec. 29, 2005 at 7-10; Qwest *ex parte* letter, WC Docket No. 02-361, filed Feb. 3, 2004.

[11] Again, in this discussion, Qwest uses the term "VoIP ISP" to refer to information service providers who originate IP/PSTN traffic.

[12] *See ex parte* Letter to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, from Ms. Melissa Newman, Qwest, CC Docket No. 01-92, *et al.*, filed Sept. 24, 2008 at 15.

traffic and use of interconnection or access services will work for VoIP/PSTN traffic under the new regime.

Unless the Commission takes the second approach described above to change the applicability of the ESP Exemption to VoIP/PSTN traffic, it would be subject to the ICC treatment afforded to all information services. Most significantly, if carriers elected to use access services for termination of VoIP/PSTN traffic, then tariffed access rates would continue to apply. If however, the VoIP ISP elected to purchase retail services from an ILEC or CLEC (as an end user subject to the ESP Exemption from access charges), then the status of VoIP/PSTN traffic would be evaluated based on the location of the VoIP ISP POP (not the location of the IP voice subscriber), and the call would be subject to reciprocal compensation or access charges depending on the relative locations of the VoIP ISP POP and the PSTN called party.[13] Again, these conclusions reflect the better reading of current law. But, unless it goes further and changes the law as Qwest suggests below, the Commission should eliminate any potential disputes on this subject by making this explicit.

While the ESP Exemption approach described above would bring certainty, an alternative approach that does not result in special treatment for VoIP/PSTN traffic is clearly preferable from a policy perspective. Thus, the Commission should undertake the following either directly by rule or by forbearance action under Section 10 of the Act. The Commission should rule that its ESP Exemption does not apply to such traffic or, as Qwest has proposed, forbear from the

[13] This is precisely what Qwest has done when it negotiates interconnection agreements with CLECs to the extent they address IP voice traffic. Qwest also allows VoIP ISPs to include this same approach in retail PRS (Primary Rate Service) contracts. All of this, however, anticipates that the Commission would categorize VoIP/PSTN traffic as an information service and would apply the ESP Exemption in a traditional fashion. As discussed in further detail in the text, Qwest believes the better approach, from a policy standpoint, is to treat VoIP/PSTN traffic identically to other traffic on the PSTN -- *i.e.*, to change this application of the ESP Exemption.

application of the ESP Exemption to this traffic -- either of which would be change of law rulings.[14] It simply does not make sense from a policy perspective to treat VoIP/PSTN traffic as any different from other like services that utilize the switching architecture of the PSTN in the very same manner.

If the Commission takes this second approach, it will need to address two additional issues. First, it is critical that the Commission clarify how jurisdictionalization of VoIP/PSTN traffic will work under the new proposed regime. Specifically, the Commission should clarify that, under this approach, the location of the ISP POP will no longer be relevant for purposes of determining jurisdiction. Rather, as with other services using the PSTN, geographical end-points and not telephone numbers would be the proper determinants of whether a call is local versus non-local (or, for non-local traffic, whether interstate or intrastate access charges apply). As Qwest explained in previous filings, carriers may use telephone numbers as a surrogate for billing purposes provided, however, that, as in other contexts such as nomadic wireless use, there must be an ability for carriers to ensure that, in the end, billing accurately reflects jurisdiction.

Second, the Commission should clarify how interconnection/access will work for VoIP/PSTN traffic under the new proposed regime. Since this scenario still assumes

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[14] The Commission has already compiled a record in the Feature Group IP and Embarq Local Operating Companies forbearance petitions proceedings, WC Docket Nos. 07-256 and 08-8, demonstrating that a forbearance approach to the issue of equalizing the access treatment of VoIP/PSTN traffic and other voice services is warranted. First, treating a VoIP POP as an end-user premises is not "necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory." Second, treating a VoIP ISP POP as an end-user premises is "not necessary for the protection of consumers." To the contrary, especially as the forbearance will allow both VoIP and traditional voice interconnection to transition to the ultimate uniform termination rate along the same path, consumers will be better protected than if the paths were disparate. Finally, avoiding discrimination between VoIP and traditional voice services during the transition will have the added benefit of "promot[ing] competition among providers of telecommunications services," which by definition meets the public interest test of Section 10.

categorization of this traffic as an information service, this can be very straight-forward. There are three possible varieties of interconnection/access that must be addressed because VoIP ISPs could conceivably get such traffic to the PSTN using services available to end users, IXC services or CLEC services. In this scenario, where, again, the Commission has forborne from the application of the ESP Exemption to VoIP/PSTN traffic (or entered a ruling changing the application of the ESP Exemption from the view discussed above), VoIP ISPs would no longer be able to deliver VoIP/PSTN traffic to the PSTN over local facilities purchased as an end user. However, they could conceivably still purchase access services for VoIP/PSTN traffic directly and such traffic would, like any other traffic sent over such facilities, be subject to access charges. Alternatively, VoIP ISPs could use the services of IXCs, who, in turn, would deliver their traffic to the PSTN over access facilities and access charges would apply just like all other traffic using the PSTN in the same way. Finally, VoIP ISPs could use the services of CLECs to deliver their VoIP/PSTN traffic to the PSTN. Of course, consistent with existing law, those CLECs can only have interconnection rights to the PSTN under Section 251 in the first place if they obtain such interconnection for the purpose of offering a telecommunications service.[15] But,

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[15] *See* 47 C.F.R. §§ 51.5 (definition of "*Telecommunications service*") and 51.100(b). Classification of VoIP/PSTN traffic as an information service means that the information services themselves continue to be recognized as non-telecommunications services. However, in this interconnection scenario, the transmission service that brings the information service to a local exchange would be common carrier in nature. This position was made crystal clear in Time Warner Cable's Request for Declaratory Ruling. *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (*Time Warner*). In *Time Warner*, several ILECs refused to interconnect with Time Warner's interconnected VoIP service, claiming that, as an information service, a VoIP provider had no interconnection rights and was obligated to purchase local exchange and other services out of the appropriate tariffs. Time Warner countered that it was not interconnecting a VoIP service to the ILEC networks under Section 251. To the contrary, Time Warner stated that it was interconnecting to the ILEC networks through the common carrier

assuming that is the case, the most logical approach to interconnection would be for terminating ILECs who receive VoIP/PSTN traffic from a CLEC to bill CLECs (rather than treating the VoIP ISPs as an IXC) at the tariffed access rate for access traffic and at reciprocal compensation rates for local traffic.

D. The Petition Also Misstates Current Law Regarding Access Charge Liability In Multi-Carrier Traffic Flows

The Petition also misstates the current law regarding the liability rules that apply with respect to access charge liability in multi-carrier traffic flows. Qwest has previously briefed this issue in detail in its comments filed in response to the 2004 VarTec and 2005 SBC Declaratory Ruling Petitions. Qwest attaches those comments as **Appendix A** to these comments and incorporates them herein in their entirety. Those comments address the specific question of which entity (or entities) in the traffic flow is (are) liable when interexchange traffic involving multiple carriers is improperly diverted into the local network at the termination end of the traffic flow in order to avoid access charges. As discussed in **Appendix A**, the Commission should declare that, in such a scenario, the following entities are liable: the originating IXC with the end-user relationship; any intermediate IXC in the chain of carriers if they did not take reasonable steps to ensure that properly tariffed fees for local exchange access are actually paid

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services of two CLECs, and that these two carriers were providing a wholesale common carrier service that entitled them to interconnection rights under Section 251. *See* Time Warner Petition for Declaratory Ruling, WC Docket No. 06-55, filed Mar. 1, 2006 at Section I. Ultimately, the Commission held that, because Time Warner interconnected through a CLEC that was providing telecommunications service, the ILECs could not deny the CLEC interconnection rights. Tellingly, the Commission emphasized that "the regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251." *Time Warner*, 22 FCC Rcd at 3520-21 ¶ 15.

on the traffic that they hand off for delivery to an end user within a local exchange;[16] the last IXC in a multi-carrier flow who improperly diverts access traffic into the local network; and any other carrier directly involved in the unlawful scheme to improperly divert access traffic into the local network.[17] All liability is properly joint and severable, with the relevant exchange carriers able to collect their tariffed charges from any or all of the liable carriers. In making these rulings, the Commission should make clear that these liability rules are limited to the particular scenario at issue here when long distance traffic involving multiple carriers is improperly diverted into the local network at the termination end of the traffic flow and access charges are not paid to the terminating LEC or LECs. In other words, for example, these rules would not impose liability on originating IXCs in all situations where terminating access charges have not been paid in a multi-carrier chain.

E. The Petition Also Misstates Current Law Regarding The Commission's Preemption In This Area

The Global NAPS Petition also contains an "in the alternative" request that the Commission issue a declaratory ruling that "any action by ... state commissions imposing rates on jurisdictionally interstate services is preempted."[18] This request is also based on a misreading of current law. Specifically, Global NAPS contends that there has already been "a total preemption of *any* state action impacting VoIP services by" the Commission.[19] Indeed, the Petition goes further and suggests that the Commission has made clear "that intermediate carriers of VoIP traffic are not subject to access tariffs, but only to negotiated charges under 47 U.S.C.

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[16] A local exchange transit carrier need not make such a demonstration because it is not covered by the access tariff.

[17] Appendix A at 15-24.

[18] Petition at 24.

[19] *Id.* at 28.

§ 251."[20] These legal contentions plainly lack merit. The Commission's rulings to-date simply do not establish, as Global NAPS would suggest, that the Commission has already completely preempted any state action impacting VoIP services and Global NAPS cites no authority for this proposition. In point of fact, the Commission has not declared all VoIP traffic, or even all nomadic VoIP traffic, to be interstate in nature. Rather, the Commission has found that there was no way to distinguish between interstate and intrastate nomadic VoIP service, and has taken several actions to preempt state regulation where state regulation would impede the Commission's own regulation of interstate VoIP. Nor do the Commission's actions regarding a prior SBC VoIP tariff or its *Time-Warner* decision remotely stand for the proposition that all VoIP traffic is subject to Section 251 interconnection and not access charges.[21] With respect to the latter, as discussed above, the *Time Warner* decision does not preclude the possibility that VoIP traffic delivered by CLECs would be subject to tariffed access charges to the extent it is access traffic.

F. The Commission Should Deny The Petition Or, In The Alternative, Enter Declaratory Rulings Consistent With These Comments

For all the reasons described above, the Commission should simply deny the Global NAPS Petition and address the issues it presents when it deals with phantom traffic and the ICC treatment of VoIP (together with access stimulation) in a separate proceeding in the near future. In the alternative, it should deny the Petition and enter declaratory rulings consistent with these comments. Specifically, it should enter declaratory rulings: (1) establishing, consistent with these comments, that VoIP/PSTN traffic is to be treated like all other traffic on the PSTN or, in the alternative, clarifying the correct ICC treatment of VoIP/PSTN traffic under the ESP

[20] *Id.* at 29.

[21] *See* pages 9-10 and n. 15, *supra.*

Exemption consistent with these comments; and (2) clarifying consistent with the analysis in **Appendix A** that, to the extent the traffic at issue arises in the context of multi-carrier chain traffic flow where there is an improper diversion of traffic into the local network at the termination end in order to avoid access charges, the following entities are jointly and severally liable for access charges - the originating IXC with the end-user relationship, an intermediate IXC in a chain of carriers if they did not take reasonable steps to ensure that properly tariffed fees for local exchange access are actually paid on the traffic that they hand off for delivery to an end user within a local exchange, the last IXC in a multi-carrier traffic flow who improperly diverts access traffic into the local network, and any other carrier directly involved in the unlawful scheme to improperly divert traffic into the local network.[22] With respect to these multi-carrier liability rules, the Commission should make clear that those rules have limited application and do not impose liability on originating IXCs for access charges in all situations where a terminating LEC is unable to collect access charges.

[22] Again, in evaluating these issues, it is critical that the Commission recognize the vital difference between proper application of lawful tariff charges to interexchange traffic and unlawful attempts to assess tariffed access charges on local exchange transit providers -- to which these tariffs do not apply.

III. CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission take the action described herein.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

/s/ Timothy M. Boucher
By: Craig J. Brown
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6608
Craig.brown@qwest.com
Timothy.boucher@qwest.com

Its Attorneys

April 2, 2010

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls	))))	WC Docket No. 05-276

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Craig J. Brown
Robert B. McKenna
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6608

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

November 10, 2005

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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("QCII"), on behalf of its affiliates Qwest Communications Corporation ("QCC"), Qwest LD Corporation ("QLDC") and Qwest Corporation ("QC") [hereafter referred to jointly as "Qwest"],[1] hereby files these comments in connection with the Petition of the SBC ILECs for Declaratory Ruling ("SBC Petition") and the Petition for Declaratory Ruling filed by VarTec Telecom, Inc. ("VarTec Petition"), respectively [the SBC and VarTec Petitions are hereafter sometimes referred to collectively as the "Petitions"], and the related primary jurisdiction referral from the United States District Court for the Eastern District of Missouri regarding the application of access charges to IP-transported calls (the "Referral").[2]

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[1] QCC is an interexchange carrier (or "IXC") and provides intraLATA and interLATA long distance service; QLDC is a reseller of both intraLATA and interLATA long distance service; and QC is the local exchange carrier ("LEC") subsidiary of QCII and also provides intraLATA long distance service.

[2] Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276, filed Sept. 19, 2005 (correction filed Sept. 21, 2005); VarTec Telecom, Inc. Petition for Declaratory Ruling, WC Docket No. 05-276, filed Aug. 20, 2004. *See* Public Notice, DA 05-2514, rel. Sept. 26, 2005. *Also see*, SBC Petition, Exhibit A, Southwestern Bell Telephone, L.P. v. VarTec, Memorandum and Order, 4:04-CV-1303 (CEJ) (E.D. Mo. Dist. Ct.), dated Aug. 23, 2005; *id.*, Exhibit F, First Amended Complaint, dated Dec. 17, 2004 ("SBC Lawsuit").

I. INTRODUCTION AND SUMMARY

The Petitions and the Referral present requests to the Federal Communications Commission (the "Commission") for declaratory rulings as to certain issues critical to a particular flavor of what has come to be labeled as "phantom traffic." The Commission should act immediately on these issues as the current potential for carriers to avoid access charges based on a proclaimed lack of clarity only advantages bad actors.[3] In the particular access traffic "problem scenario" at issue here, interexchange traffic that is subject by rule and tariff to pay tariffed access charges is improperly diverted into the local exchange network in a manner inconsistent with the LEC's tariffs. Moreover, because multiple carriers are involved in the traffic flow, disputes arise as to which entity or entities are liable to the terminating LEC for the access charges. In the specific traffic flow at issue in the Petitions and the Referral, the improper "diversion" happens because the last interexchange provider transporting the traffic (Point One) is pretending to be an end user (*i.e.*, claiming to be an enhanced service provider ("ESP") for the common carrier service it provides) and terminates the call to the incumbent LEC (the "ILEC," SBC) over local interconnection facilities (either directly or through a competitive LEC ("CLEC"). SBC contends that both VarTec, the IXC that hands the traffic to Point One, and Point One are liable for the access charges due for this traffic and both VarTec and Point One deny liability.

[3] As Qwest has previously indicated in *ex partes* filed in the *Intercarrier Compensation* rulemaking proceeding, discussed more fully below, phantom traffic has evolved from its original narrow definition to describe a number of situations in which the traffic is delivered to a terminating carrier in a manner that makes appropriate billing impossible.

While the problems created by this scenario could be resolved by comprehensive reform in the Commission's *Intercarrier Compensation* rulemaking proceeding, the Commission can and should immediately resolve the issues presented by the Petitions as Qwest advocates below.

All of the issues presented by the Petitions and the Referral are easily resolved under relevant law. Most importantly, the Commission, in its April 21, 2004 AT&T "IP-in-the-Middle" Declaratory Ruling (hereafter, the "IP-in-the-Middle Ruling"), has already ruled that the type of traffic at issue here -- ordinary long distance calls transported, in part, using IP technology -- is not an "enhanced" service despite the fact that IP technology is used in the transmission of that traffic.[4] Moreover, the Commission made it unambiguously clear that the IP-in-the-Middle Ruling applies to this type of traffic regardless of whether only one interexchange carrier is involved in transporting the traffic or multiple service providers are involved. As described more fully below, the IP-in-the-Middle Ruling, together with other principles of existing, relevant law resolves each of the central issues presented in the Petitions and the Referral.

Accordingly, the Commission should grant SBC's request for a declaratory ruling to the extent it is consistent with Qwest's analysis above and below: The Commission should enter declaratory relief clarifying that Point One does not qualify for the ESP Exemption, is not otherwise "exempt" from liability for access and is, in fact, on an equal plane with other transmission providers when it comes to access charge liability. The question of who is liable, under the Act, 47 U.S.C. § 151, *et seq.*, and the Commission's rules promulgated thereunder, in the context of multi-carrier chain traffic flow where there is an improper diversion of traffic into

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[4] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7457-58 ¶ 1 ("IP-in-the-Middle Ruling").

the local network at the termination end in order to avoid access charges[5] is a different issue. In order to resolve this issue, the Commission should enter declaratory relief clarifying the multi-carrier liability rules that apply in these circumstances. Specifically, the Commission should declare that, in such circumstances, the following entities are jointly and severally liable: the originating IXC with the end-user relationship;[6] an intermediate IXC in a chain of carriers if they did not take reasonable steps to ensure that properly tariffed fees for local exchange access are actually paid on the traffic that they hand off for delivery to an end user within a local exchange; the last IXC in a multi-carrier traffic flow who improperly diverts access traffic into the local network; and any other carrier directly involved in the unlawful scheme to improperly divert traffic into the local network.[7] In doing so, as discussed more fully below, the Commission should make clear that these liability rules have limited application and do not impose liability on originating IXCs for access charges in all situations where a terminating LEC is unable to collect access charges.

This declaratory relief would resolve the remaining issues presented by the Petitions and the Referral. Consistent with the above, the Commission should deny VarTec's request for a declaration that it is not liable for access charges in these circumstances. The Commission should also grant SBC's request in its petition for a declaratory ruling to the extent it seeks a clarification that it has stated a claim that Point One is liable in these circumstances. Similarly,

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[5] The access charges at issue are, by definition, terminating access charges.

[6] As used in this context, the terms "originating IXC" or "originating IXC with the end user relationship" have the same meaning and refer to the originating IXC with the end user relationship or the calling party's carrier.

[7] In evaluating these issues, it is critical that the Commission recognize the vital difference between proper application of lawful tariff charges to interexchange traffic and unlawful attempts to assess tariffed access charges on local exchange transit providers – to which these tariffs do not apply.

the Commission should respond to the Referral with a declaration that Point One is, in fact, an IXC as SBC contends. As described above and below, VarTec could be liable either as an originating IXC, an intermediate IXC that failed to take reasonable steps consistent with the principles described above and below and as an active participant in a scheme to avoid access charges through the improper diversion of traffic into the local network. Point One could be liable as the last IXC in a multi-carrier flow who improperly diverts access traffic into the local network and as a direct participant in an unlawful scheme to avoid access charges through the improper diversion of traffic into the local network.

II. BACKGROUND

A. The Commission's "IP-In-The-Middle" Ruling And Related Commission Dockets

The Commission determined, in the IP-in-the-Middle Ruling, that IP-in-the-middle long distance calls, which begin and end on the Public Switched Telephone Network ("PSTN") and involve no net protocol conversion, are "telecommunications services" subject to access charges. AT&T had claimed that interexchange calls that originated on the PSTN and terminated on the PSTN but which were transported across AT&T's long haul network using Internet protocol ("IP") technology were exempt from access charges.[8] In rejecting that argument, the Commission emphasized that its ruling was "limited to the type of service described by AT&T in [that] proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology."[9] The

[8] IP-in-the-Middle Ruling, 19 FCC Rcd at 7457-58 ¶ 1.

[9] *Id.*

Commission expressly ruled that the use of IP to transmit ordinary long distance calls does not transform those calls into "enhanced" services exempt from access charges.[10]

While AT&T used IP in the middle of its own network, the petition in that matter, the record and the resulting order all addressed the possibility that multiple service providers may be involved in providing IP transport. With respect to such multi-carrier scenarios, the Commission, in the IP-in-the-Middle Ruling, stressed that it wanted to make unambiguously clear that there should be no disparity in the treatment of this type of service for access charges purposes based on the number of carriers involved:

> Our analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved.[11]

Several other portions of the IP-in-the-Middle Ruling are directly relevant to this proceeding. The Commission also stated:

> [W]hen a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges.[12]

Finally, citing Rule 69.5(b) (which states "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services"), the Commission ruled that access charges applied to the traffic at issue because "AT&T's specific service utilizes the LECs'

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[10] *Id.* at 7465-66 ¶ 13, 7468-69 ¶ 18.

[11] *Id.* at 7457-68 ¶ 1, 7469-70 ¶ 19.

[12] *Id.* at 7469-70 ¶ 19.

originating and terminating switching facilities in the same manner as its circuit-switched interstate traffic."[13]

In the IP-in-the-Middle Ruling, the Commission noted the relationship of the issues addressed therein to the comprehensive rulemaking proceeding already commenced to address IP services, generally -- the *IP-Enabled Services* proceeding -- and the *Intercarrier Compensation* rulemaking proceeding.[14] The Commission was careful to emphasize that it was adopting the IP-in-the-Middle Ruling "to provide clarity to the industry with respect to the application of access charges pending the outcome of [the *IP-Enabled Services* proceeding]" and that it also did not intend to preclude the Commission from adopting a different approach in either that proceeding or the *Intercarrier Compensation* rulemaking proceeding.[15]

With respect to the latter, since the release of the IP-in-the-Middle Ruling in April of 2004, the Commission has issued the Further Notice of Proposed Rulemaking in the *Intercarrier Compensation* proceeding (the *Intercarrier Compensation* FNPRM") and the *Intercarrier Compensation* FNPRM has been thoroughly briefed through voluminous comments and *ex partes*. As part of that record, Qwest and other parties have demonstrated the urgent need for the Commission to take immediate action with respect to "phantom" access traffic issues like the traffic scenario at issue in this proceeding in which terminating LECs are deprived of access charges to which they are entitled.[16]

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[13] *Id.* at 7466 ¶ 14, 7468-69 ¶ 18.

[14] *Id.* at 7463-64 ¶ 10. *And see In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*").

[15] IP-in-the-Middle Ruling, 19 FCC Rcd at 7458 ¶ 2.

[16] *See, e.g.,* Qwest *ex partes* on Phantom Traffic, CC Docket No. 01-92, dated Sept. 8, 2005 and Sept. 29, 2005.

B. The Problem Traffic Flow Scenario At Issue In The Petitions And The Referral

As is described in detail at pages five through ten of the SBC Petition, the traffic flow scenario at issue in the Petitions and the Referral is identical to that at issue in the IP-in-the-Middle Ruling except that instead of having one IXC use IP transport -- as AT&T did -- multiple service providers are involved.[17] As with the traffic at issue in the IP-in-the-Middle Ruling, the traffic at issue here is ordinary long distance traffic that is transported using IP technology in a part of the traffic flow to the terminating LEC. In the specific scenario at issue here, VarTec hands off traffic to Point One and Point One utilizes IP technology in transporting the traffic over its network.[18] As in the IP-in-the-Middle Ruling, the traffic originates and terminates on the PSTN without a net protocol conversion, uses ordinary CPE with no enhanced functionality and provides no enhanced functionality to end users due to the use of IP technology. As in the IP-in-the-Middle Ruling,[19] the traffic is ultimately terminated to the terminating LEC via a CLEC -- like in the AT&T case, Point One inappropriately routes the access traffic through a CLEC and the CLEC then terminates the traffic to the terminating LEC over local interconnection facilities.[20] When this happens, the terminating LEC is unable to bill access charges in the normal course.[21]

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[17] SBC Petition at 5-10. In the particular scenario at issue here, there is only one carrier in the chain using IP technology but the same principles apply to multi-carrier chains where more than one carrier uses IP technology.

[18] *Id.* at 15.

[19] IP-in-the-Middle Ruling, 19 FCC Rcd at 7464 n.49.

[20] SBC Petition at 10, Illustration 4.

[21] While the VarTec Petition is noticeably vague with respect to just what kind of carrier VarTec is, the SBC Petition describes VarTec as a retail long distance provider. VarTec contracts with Point One (and other carriers like it that utilize IP in transporting traffic) to terminate at least some of its access traffic.

C. The SBC Lawsuit And The Referral

The SBC Lawsuit, filed on December 20, 2004, names VarTec, Point One, Unipoint[22] and Transcom as defendants and alleges that each of those entities transport interexchange traffic that is eventually terminated to SBC without payment of access charges. In the SBC Lawsuit, SBC alleges that all are therefore liable (under breach of state and federal tariffs, unjust enrichment, fraud and civil conspiracy theories) for access charges applicable to that traffic.[23]

In responding to that lawsuit and/or in filings with the Commission, VarTec and Point One have, essentially, pointed the finger at each other. VarTec contends that, when it contracts with an IP-based transmission provider like Point One, that IP-based carrier, not VarTec, is liable for access charges.[24] Point One contends that, under Rule 69.5(b), only IXCs are liable for access charges and that it is not a common carrier and not an IXC.[25] Point One contends that it is, in any event, an ESP qualifying for the ESP Exemption from liability for access charges.[26] Finally, Point One also appears to rely on the language from paragraph 19 of the IP-in-the-Middle Ruling to argue that, when it contracts with VarTec to provide transmission service using IP technology, only VarTec is liable for any access charges.[27]

In ruling on motions to dismiss filed by the defendants in the SBC Lawsuit, the district court acknowledged that SBC stated a claim against VarTec based upon the paragraph 19

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[22] Point One and Unipoint are the same entity.

[23] SBC Petition at Exhibit F.

[24] VarTec Petition at 5-6.

[25] SBC Petition at Exhibit G (Point One Motion to Dismiss).

[26] *Id.*

[27] Again, that language is as follows "When a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges." IP-in-the-Middle Ruling, 19 FCC Rcd at 7469-70 ¶ 19.

language cited above from the IP-in-the-Middle Ruling -- *i.e.*, as a carrier that contracts with a provider of IP-enabled voice services to terminate traffic.[28] However, the district court referred Point One's contentions to the Commission on a primary jurisdiction referral -- stating that, in order for the court to find that SBC had stated a claim against Point One, it must conclude either that Point One is an IXC or that access charges may be assessed against entities other than IXCs.[29] The court found that either determination fell within the primary jurisdiction of the Commission.[30]

D. The SBC And VarTec Petitions

Both SBC and VarTec have filed petitions for a declaratory ruling relating to the Referral. In the SBC Petition, SBC argues that wholesale transmission providers using IP technology to transport ordinary long distance calls are liable for access charges under Rule 69.5 and applicable tariffs.[31] SBC first argues that various relevant provisions of the Commission's Part 69 rules on access (definitions in Rules 69.2(b), 69.2(s) and 69.2(m) and 69.5), industry practice (by which wholesale providers are customarily charged access charges) and the SBC tariffs/filed tariff doctrine all demonstrate that Point One is an IXC liable for access charges.[32] In response to Point One's specific argument that it is not a common carrier and therefore can not be an IXC, SBC argues that Point One is, in fact, a common carrier because Point One offers

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[28] SBC Lawsuit at 6.

[29] *Id.* at 7-9.

[30] *Id.* at 8.

[31] SBC Petition at 17-33.

[32] *Id.* at 17-24.

transmission "to all comers" and argues that Point One can not escape the common carrier definition by claiming it is an ESP that qualifies for the ESP Exemption.[33]

On this latter point, SBC argues (correctly, Qwest believes): (1) that the IP-in-the Middle Ruling has already ruled that the type of traffic at issue is a "telecommunications service," not an enhanced service, despite the fact that IP technology is used in the transmission of that traffic; and (2) that this circumstance does not otherwise satisfy the definition of the ESP Exemption (*e.g.*, unlike a true ESP Exemption scenario, Point One uses the PSTN in the same manner as an IXC).[34] SBC also argues, again correctly, that it is in any event not necessary that an entity be a common carrier in order to qualify as an IXC.[35] Finally, SBC asserts that "the access charge liability of Point One and other carriers is unchanged by the fact that these carriers have avoided purchasing Feature Group D facilities from the SBC ILECs, and instead obtain access to the SBC ILECs' local exchange facilities by routing calls through CLECs."[36] Citing the Fifth Report and Order of the *Access Charge Reform* proceeding, 14 FCC Rcd 14221, 14318-19 ¶ 188 (1999) (the "*Access Fifth Report and Order*"), SBC notes that "affirmative consent [is] unnecessary to create a carrier-customer when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services."[37]

In the VarTec Petition, VarTec seeks a declaratory ruling that it is not liable for access charges in the circumstances presented by the SBC Lawsuit. VarTec asks for a declaratory

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

ruling that it is not either SBC's or any other LEC's customer under access tariffs for calls that it delivers to ESPs or other carriers to terminate and that any attempt to collect access charges from it are violations of Sections 201(b) and 203(c) of the Act.[38]

III. ARGUMENT

A. The Central Issues Presented By The Petitions And The Referral Should Be Resolved Immediately

As described more fully above and below, the central aspects of the SBC and VarTec Petitions present no new legal issues. The Commission has already made clear that the services at issue here are telecommunications services not enhanced services and that the ESP Exemption does not apply.[39] The broader issue of who is liable in multi-carrier access traffic flows such as the one presented here – where traffic is improperly diverted into the local network in order to avoid access charges and access charges are not paid -- is also readily addressed under existing law.

The issues presented by these petitions represent a particularly thorny subset of the phantom traffic phenomenon that, as Qwest and others have advocated, could be eliminated by comprehensive reform in the *Intercarrier Compensation* rulemaking proceeding. Qwest urges the Commission to act as soon as possible in these broader proceedings as comprehensive reform is most certainly needed. However, the solution to this problem is critical and should not await the comprehensive reform contemplated in that proceeding. As Qwest has previously indicated in *ex partes* filed in the *Intercarrier Compensation* rulemaking proceeding, phantom traffic describes a number of situations in which the traffic is delivered to a terminating carrier in a

[38] VarTec Petition at 1, 3-8.

[39] The "ESP Exemption" permits an ESP to designate its ESP/Internet service provider ("ISP") point of presence ("POP") as an end-user premise for access charge purposes when providing an enhanced or information service. It is not really an exemption.

manner that makes impossible the billing of access charges.[40] This proceeding involves one flavor of the phantom traffic phenomenon where interexchange traffic that is subject by rule and tariff to tariffed access charges is improperly diverted into the local services network, access charges are not paid and the fact that multiple carriers are involved gives rise to a dispute about which entity or entities are liable to the terminating LEC for the access charges.[41] In the particular scenario presented by the Petitions, the improper "diversion" happens because the last wholesale provider transporting the access traffic (Point One) is pretending to be an end user (*i.e.*, claiming to be an ESP for the common carrier service it provides) and terminates the call to the ILEC over local trunks (either directly or through a CLEC).

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[40] *See* note 16, *supra*. As described in those *ex partes*, phantom traffic includes such scenarios as terminating access traffic that has been erroneously designated as interstate when in fact it is jurisdictionally intrastate or has been erroneously designed as end-user traffic and diverted improperly into the local exchange network over local interconnection facilities. Qwest has already outlined the four steps the Commission must take immediately to deal with the broader aspects of the phantom traffic problem: (1) clarify that originating carriers may not lawfully conceal or alter any identifying information in a call that permits proper billing; (2) clarify that transit carriers are not liable to terminating carriers for third-party originated traffic they deliver; (3) clarify that the jurisdiction of any call is based on the end-points of the call -- in the case of an end-user to end-user call, the end-points are the locations of the called and calling parties and, in the case of an end user to or from ISP call (including IP voice), the end-points of the call are the calling(ed) party and the ISP POP (this is consistent with a proper interpretation of the "ESP Exemption," which simply treats an ISP/ESP POP as an end-user premise for access charge purposes); and (4) clarify that efforts by carriers to avoid access charges by including "information" or "processing" in their long distance calls in a manner that does not meet the strict tests for an information/enhanced service under the *Computer Inquiry II* rules are not compliant with the law and expose such carriers to, among other things, disconnection by injured LECs. Again, it is important to remember that these rules apply only to access traffic. Access tariffs do not apply to local exchange transit providers.

[41] Again, while VarTec and Point One contend that this traffic is exempt from access charges under the ESP Exemption, that contention is frivolous and can be dismissed summarily as discussed below.

Qwest agrees with SBC that this is a significant problem -- as measured both in terms of lost access charges and the administrative disarray that the problem creates for the industry.[42] The Commission can and should immediately resolve the issues directly presented by the Petitions and the Referral based on existing law as Qwest advocates below. The current potential for some carrier to avoid tariffed charges based on a proclaimed lack of clarity only advantages bad actors and disadvantages legitimate business practices.

B. Point One Does Not Qualify For The ESP Exemption And Is, In Fact, Not Exempt From Access Charge Liability

Point One's contention that it is an ESP qualifying for the ESP Exemption from liability for access charges should be rejected as patently frivolous. The Commission, in the IP-in-the-Middle Ruling, has already ruled that this type of traffic -- ordinary long distance calls transported, in part, using IP technology -- is not an "enhanced" service despite the fact that IP technology is used in the transmission of that traffic. Moreover, the Commission made it unambiguously clear that the IP-in-the-Middle Ruling "applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved."[43]

Point One's position seems to be that, if it provides some enhanced or information services, then that fact alone results in the classification of all of its services as enhanced or information services, even if those services are telecommunications services under the Act. Such is clearly not the case.

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[42] While SBC is somewhat vague as to what theory of liability it proposes, SBC appears to believe that, as a terminating LEC deprived of access charges in this scenario, it is entitled to recover those access charges from any carrier in a multi-carrier traffic flow (except the CLEC that hands the traffic to it) apparently without any need for guiding legal principles. As described more fully below, Qwest suggests that the Commission take this opportunity to expound upon the applicable law as set forth below.

[43] IP-in-the-Middle Ruling, 19 FCC Rcd at 7457-58 ¶ 1, 7469-70 ¶ 19.

A "telecommunications carrier" under the Act is a "provider of telecommunications services."[44] When Point One provides telecommunications services, it fits into the statutory definition, no matter what it might be classified as when engaged in other activities. SBC is correct in its contention that Point One can also not escape the common carrier definition by claiming it is an ESP that qualifies for the ESP Exemption.[45] Qwest also supports SBC's contention that Point One is a common carrier and, even if it were not a common carrier, it is an IXC.

In light of this, the Commission should reconfirm that a wholesale transmission provider like Point One is not exempt from liability for access charges based on the ESP Exemption and that it did not intend, through paragraph 19 of the IP-in-the-Middle Ruling, to otherwise exempt such carriers from liability under its access charge rules. In other words, a wholesale transmission provider that uses IP technology in a multi-carrier chain is exposed to liability on an equal plane with any other transmission provider when it comes to access charge liability.

The question of who is liable in a multi-carrier chain under the Act and the Commission's rules promulgated thereunder when traffic is improperly diverted into the local network at the termination end in order to evade access charges is a different question. However, that question can also be resolved through the relevant law as described immediately below.

C. The Commission Should Enter Declaratory Relief In SBC's Favor, But In Order To Do So, It Must Expound Upon The Broader Multi-Carrier Liability Issues Implicated By The Petitions And The Referral

The remainder of the issues presented by the Referral and the Petitions reduce to a single issue that is easily dealt with under relevant law. That is the question of which entity or entities in the traffic flow is liable when interexchange traffic involving multiple carriers is improperly

[44] 47 U.S.C. § 153(44).

[45] SBC Petition at 17-24.

diverted into the local network at the termination end of the traffic flow in order to avoid access charges.[46] Again, in the traffic flow at issue here, the last wholesale provider transporting the access traffic (Point One) is pretending to be an end user (*i.e.*, claiming to be an ESP for the common carrier service it provides) and terminates the call to the ILEC over local trunks (either directly or through a CLEC) and, as a result, the terminating LEC or LECs are deprived of access charges to which they are entitled (and which are required to be collected and paid under the relevant federal tariffs as a matter of law). As discussed more fully below, the Commission should declare that, in such a scenario, the following entities are liable: the originating IXC with the end-user relationship;[47] any intermediate IXC in the chain of carriers if they did not take reasonable steps to ensure that properly tariffed fees for local exchange access are actually paid on the traffic that they hand off for delivery to an end user within a local exchange;[48] the last IXC in a multi-carrier flow who improperly diverts access traffic into the local network; and any other carrier directly involved in the unlawful scheme to improperly divert access traffic into the local network. All liability is properly joint and severable, with the relevant exchange carriers able to collect their tariffed charges from any or all of the liable carriers. Finally, the Commission should make clear that these liability rules are limited to the particular scenario at issue here when long distance traffic involving multiple carriers is improperly diverted into the local network at the termination end of the traffic flow and access charges are not paid to the terminating LEC or LECs. In other words, for example, these rules would not impose liability

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[46] Again, this analysis, by definition, applies solely to liability for terminating access charges. *See* note 5, *supra*.

[47] Again, the terms "originating IXC" or "originating IXC with the end user relationship" have the same meaning and refer to the originating IXC with the end user relationship or the calling party's carrier. *See* note 6, *supra*.

[48] A local exchange transit carrier need not make such a demonstration because it is not covered by the access tariff.

on originating IXCs in all situations where terminating access charges have not been paid in a multi-carrier chain.

1. The relevant law

The legal principles, under the Act and Commission rules, relevant to the determination of who is liable to the terminating LEC under this particular scenario are fairly straight-forward.

The starting point for the analysis of liability for terminating access charges in these multi-carrier scenarios is Rule 69.5(b). Again, that rule states that access charges "shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."

The Commission has also explained that Rule 69.5(b) is intended to reflect the principle that the "*calling party's carrier*, whether LEC, IXC or [commercial mobile radio service] CMRS, [is required] to compensate the called party's carrier for terminating the call."[49] Such "Calling-Party's Network Pays" arrangements ("CPNP") ensure that the charges for terminating access are built into the charges paid by the caller to its IXC so that the "cost-causer" (*i.e.*, the caller) ultimately bears its share of the costs.

The IP-in-the-Middle Ruling in which the Commission clarified that access charges apply to the traffic at issue here is also relevant to this analysis. The Commission's critical finding, in making that ruling, was its determination that "AT&T's specific service utilizes the LECs' originating and terminating switching facilities in the same manner as its circuit-switched interstate traffic."[50]

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[49] *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9614-15 ¶ 9 (emphasis added).

[50] IP-in-the-Middle Ruling, 19 FCC Rcd at 7469 ¶ 18.

The Commission's constructive ordering doctrine is also directly relevant here. This doctrine, which is an application of the filed tariff doctrine, requires that a carrier that uses the tariffed services of another carrier must pay the tariffed rate even if it did not physically order the service if it had reason to believe that the services of the other carrier might have been utilized in an overall access service provision. An exception to the doctrine arises when the carrier has taken reasonable steps to prevent the use of the services of the carrier seeking to apply its tariff. This doctrine has evolved through a number of payphone cases, *see, e.g.*, *United Artists Payphone Corporation v. New York Telephone Company*, Memorandum and Order, 8 FCC Rcd 5563 (1993), but at its core lies the principle that the fact that a carrier has not directly ordered tariffed service from a carrier is not dispositive as to the question of whether or not that carrier is liable for the tariffed rate for service actually provided to that carrier.

The Commission's most recent statement of the constructive ordering doctrine was the *Access Fifth Report and Order* language cited in the SBC Petition as described above. That language stated:

> In United Artists, the Commission found that affirmative consent was unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services.[51]

Under the doctrine, if a carrier is in fact provided with tariffed access services by another carrier, the normal presumption is that it is liable for the tariffed rates assessed for that service.[52]

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[51] *Access Fifth Report and Order*, 14 FCC Rcd at 14318-19 ¶ 188.

[52] *See* Eighth Report and Order and Fifth Order on Reconsideration, *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, 19 FCC Rcd 9108, 9113-19 ¶¶ 10-21 (2004), in which an IXC was held to be liable, in a traffic flow that went from an IXC to an ILEC to a CLEC and then to a CMRS provider, to an intermediate

2. In this scenario, the originating IXC with the relationship with the end user is jointly and severally liable to the terminating LECs for properly tariffed access charges

All of these governing legal principles described above point to the conclusion that, in the problem scenario at issue here, terminating LECs may recover unpaid access charges from the originating IXC with the relationship with the end user (jointly and severally, as described below, with: intermediate carriers in the chain; the last IXC improperly diverts the traffic into the local exchange; or carriers directly and actively participating in the improper diversion of traffic into the local exchange). Construing Rule 69.5(b) in the light of the cost-causation principles outlined above, the proper interpretation of the rule is clear. The originating IXC that uses local exchange switching for the provision of services to its end user has constructively ordered terminating access services pursuant to the relevant tariffs of all LECs actually providing terminating access services. Indeed, with respect to the cost-causation principle, the Commission has emphasized in an analogous context that it is inappropriate to require or allow transit carriers to bear costs incurred in connection with transit traffic, because the transit carrier has no billing or other relationship with the end-user customers placing or receiving calls. Similarly, in these access scenarios where there has been an improper diversion of traffic into the local network at the termination end of the call, even if the originating IXC contracts with an intermediate carrier to transport the traffic, the terminating LECs may recover from the originating IXC as the cost-causer of the access service pursuant to the terminating LEC's duly filed tariffs. An originating IXC obviously cannot claim to reasonably expect that its traffic will

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CLEC for tariffed services when the IXC's relationship was with an ILEC to which it was directly connected. *See*, however, *In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 13195-99 ¶¶ 7-15 (2002), in which this doctrine was not applied in a situation where the services were not tariffed. These decisions do not deal with intra-MTA or other calls involving a transit carrier.

not be terminated over the facilities of the LEC serving the end-user customer, and is naturally deemed to have constructively ordered that service.[53] Finally, reading the language from paragraph 18 of the IP-in-the-Middle Ruling (19 FCC Rcd at 7468-69) (finding that "AT&T's specific service utilizes the LEC's originating and terminating switching facilities in the same manner as its circuit-switched interstate traffic") in conjunction with the cost-causer principles discussed above yields the same result. The originating IXC is the carrier that "utilizes" the LEC's terminating switching facilities when it originates traffic as part of its retail long distance service.

3. Intermediate carriers in a chain of carriers could also be liable jointly and severally

In addition to permitting terminating LECs to recover unpaid access charges from the originating IXC with the end-user relationship, the governing principles described above also point to the conclusion that even a true intermediate carrier in a chain of carriers (*i.e.*, a carrier without a direct relationship with either a calling party end user or a LEC) could be liable for access charges in these scenarios. Unlike the carrier that has a relationship with the originating customer (*see* Section III.C.2., *supra*) and the carrier that has actually ordered service from a LEC (*see* Section III.C.4., *infra*), a true intermediate carrier has an argument that it has not constructively ordered service from the terminating ILEC. The true intermediate carrier is acting purely as a "carrier's carrier" and is generally invisible to both the originating caller and the terminating LECs. However, if an intermediate carrier did not take reasonable steps to ensure that the traffic handed to it that is bound for delivery to an end user within a given local exchange is terminated according to the applicable tariff of the local exchange carrier serving

[53] Obviously an originating IXC can take other contractual steps, such as obtaining indemnification provisions in its contracts with other carriers, to protect itself in the event that the terminating LEC(s) do not receive their proper tariffed compensation.

that terminating end user, it would also be liable -- jointly and severally with any other carrier liable -- for the service provided where traffic is improperly diverted to the local network and access charges are not paid.

4. The last IXC in a multi-carrier flow who improperly diverts access traffic into the local network is also jointly and severally liable for payment of access charges

As described above, the problem scenario at issue in this proceeding is an access traffic flows where two things occur: (1) there are multiple service providers involved in the transportation of the access traffic; and (2) a carrier or carriers at the termination end of the traffic flow has violated the Commission's access regime and the tariffs of the terminating LECs. Specifically, interexchange telecommunications services are being improperly terminated over local exchange switching facilities without payment of the rates established in the LEC tariffs and required by Section 69.5(b) of the Commission's rules. This is accomplished because the IXC asserts an incorrect claim to ESP status for the traffic at hand or simply disguises the traffic so that it appears to be local even though it is not. In either event, this final IXC has established a relationship with the LEC that, either directly or constructively, requires payment of the proper tariffed charges assessed by all terminating LECs whose facilities are being used. This additional prong of joint and several liability for the final IXC in a multi-carrier chain is also consistent with the law and principles discussed above and is good public policy.

An IXC that orders access service from a LEC for long distance traffic is liable under the tariffs of all LECs involved in the provision of the access service. If the IXC seeks to avoid the proper tariffed rates by pretending to be an end user, an ISP, or something else, this does not reduce its essential liability to pay the tariffed rates for services it receives. The use of an ILEC's local switching facilities to originate or terminate long distance telecommunications services is governed by the access tariffs of the LEC. Whether it is deemed that these IXCs have

ordered such access directly or constructively is not relevant -- they have received tariffed services and are liable as a matter of federal law to pay the tariffed rates for those services.[54]

5. Other direct participants in the unlawful scheme to improperly divert traffic to the local network in order to avoid access charges are also liable

Even if not otherwise rendered liable by any of the analyses above (relating to the originating IXC with the end-user relationship, a true intermediate carrier and the last IXC in line), a carrier that is a direct and active participant in an unlawful scheme to avoid access through improper diversion of traffic into the local network is liable to the terminating LECs for access charges on that basis alone.[55] For example, in the traffic flow at issue in this proceeding, CLECs who received the traffic could be liable if they were directly and actively involved in the unlawful scheme to improperly divert traffic into the local network. Notably, the CLEC receiving the traffic could be liable if it is acting as an IXC and improperly terminating the traffic over local facilities, namely its interconnection trunking with the terminating LEC. However, even where the CLEC is not liable as an IXC, it can be liable if it has provided local facilities (*e.g.*, PRI/PRS services) to an entity improperly claiming to be offering enhanced services and it

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[54] The concept of "jointly provided" switched access or "meet point" access is of long-standing duration. *See, e.g., generally, In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579 (Phase II), Order, 65 Rad. Reg. (P&F) 2d 650 (CCB 1988), *on review*, Memorandum Opinion and Order, 4 FCC Rcd 7914 (1989).

[55] In a transiting situation involving local traffic, however, a local exchange transit carrier with no relationship to the caller is not liable for termination charges. *See Texcom, Inc., d/b/a Answer Indiana, Complainant, v. Bell Atlantic Corp., d/b/a Verizon Communications, Defendant.*, File No. EB-00-MD-14, Order on Reconsideration, 17 FCC Rcd 6275, 6276-77 ¶ 4 (2002). *See also In re Exchange of Transit Traffic*, Docket No. SPU-00-7, "Proposed Decision and Order" (Nov. 26, 2001 Iowa Utils. Bd.) ("*IUB Proposed Decision*"), at 13; *In re Exchange of Transit Traffic*, Docket No. SPU-00-7, "Order Affirming Proposed Decision and Order" (Mar. 18, 2002 Iowa Utils. Bd.)("*IUB Order Affirming Proposed Decision*"); *Rural Iowa Independent Tel. Ass'n. v. Iowa Utils. Bd.*, 385 F. Supp.2d 797 (SD Iowa 2005)("*RIITA v. IUB*"), *appeal pending*, case no. 05-3579 (8th Cir.); *3 Rivers Tele. Coop. v. U.S. West*, 2003 U.S. Dist. LEXIS 24871 at *67 (D. MT 2003) ("*3 Rivers*").

has not taken minimum, affirmative steps to prevent misuse of its local services when it becomes aware of such misuse. Just what steps a CLEC must take is the subject of the Grande Petition which the Commission has recently publicly noticed.[56]

6. Any declaration regarding these liability rules should be expressly limited and the Commission should clarify that a terminating LEC bears the burden of affirmatively demonstrating the applicability of these rules to its claim

As discussed above, in the declaratory rulings on these issues, the Commission should make clear that these liability rules apply to the particular problem scenario at issue here where interexchange traffic involving multiple IXCs is improperly diverted into the local network at the termination end of the traffic flow and access charges are not paid to the terminating LEC or LECs. In other words, the originating IXC should not be made, by operation of these rules, a guarantor of access charges to the terminating LEC under any and all circumstances where a terminating LEC is unable to collect access charges in a multi-carrier chain. Obviously a multitude of other issues might arise in a multi-carrier context and not all are properly addressable here. By way of example, these rules do not give a terminating LEC a warrant to simply bypass the IXC handing the traffic to it in the normal circumstances and seek access charges from the originating IXC. Additionally, the terminating LEC obviously has an affirmative burden to demonstrate that it qualifies to avail itself of these liability rules – *i.e.*, that it is in fact a terminating LEC in a traffic flow where access traffic has actually been improperly diverted onto the local network at the termination end of a traffic flow in order to avoid access

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[56] *See* Petition for Declaratory Ruling of Grande Communications, Inc., *In the Matter of Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VoIP Traffic*, filed Oct. 3, 2005, as publicly noticed on Oct. 12, 2005, DA 05-2680, *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, WC Docket No. 05-283.

charges, that it has, in fact, not received access charges for the traffic, and that the defendant or defendants fit into the liability rules articulated above.

7. The Commission should clarify that the liability of these entities under the Act to terminating ILECs does not affect the rights and liabilities of IXCs to each other

As discussed above, the declaratory rulings requested above relate solely to the issue of who is liable in the specific context of multi-carrier interexchange traffic flows where traffic has been improperly diverted to the local network at the end of the flow and, as a result, access charges have not been paid. These rulings are essential to solving the primary problem created in this scenario -- clarifying who is liable under the Act and the Commission's rules to the terminating LEC for the access charges that have not been paid in these circumstances. In making these rulings, the Commission must be careful to stress that this liability rule is independent of any other remedies that may be available to the various parties involved in such traffic flows and should not make any finding which would suggest that this clarification expands upon, dilutes or otherwise alters any such remedies whether contractual or otherwise. Inter-IXC compensation rights are properly dealt with via contract, and are not implicated in this proceeding. For example, under the first prong of liability, the originating IXC would not be able to escape liability to the terminating LEC by pointing to its contract with the carrier to which it handed traffic. However, while subject to liability to the terminating LEC, the originating IXC would still possess its independent contractual remedies against such an intermediate carrier -- for example, depending upon the terms of the applicable contract, it may still be able to assert an indemnification claim.

D. The Above Analysis Resolves The Central Issues Presented In the Petitions and the Referral

The analysis outlined above resolves each of the central issues presented by the Petitions and the Referral. SBC is correct that Point One does not qualify for the ESP Exemption and is not "exempt" from liability for access. Accordingly, the Commission should grant SBC's Petition to the extent it seeks that clarification. In other words, the Commission should declare that Point One, as wholesale transmission provider that uses IP technology in a multi-carrier chain and improperly diverts long distance traffic into the local exchange, is exposed to liability on an equal plane with other transmission providers when it comes to access charge liability. Similarly, the Commission should affirmatively state that it did not intend, through paragraph 19 of the IP-in-the-Middle Ruling, to exempt carriers such as Point One from liability under its access charge rules. The Commission should respond to the Referral with a declaration consistent with these principles – that Point One is, in fact, an IXC as SBC contends.

The question of whether Point One and VarTec are liable for access charges in a given traffic flow is a different question. With respect to this aspect of the SBC petition, the Commission should also declare that SBC has stated a claim that Point One is liable under the third and fourth rules of liability described above -- as the last IXC in a multi-carrier flow who improperly diverts access traffic into the local network and as a direct and active participant in an unlawful scheme to avoid access charges by improperly diverting traffic into the local network. Accordingly, this aspect of SBC's Petition should be granted and the Referral should be answered consistent with that finding. Finally, the Commission should deny VarTec's request for a declaration that it is not liable for access charges in the traffic flow scenario at issue in the Petitions and the Referral. As described above, VarTec could be liable under the circumstances presented in this proceeding either as an originating IXC with the end user relationship, an

intermediate IXC that failed to take reasonable steps to ensure that the traffic that it handed off for delivery to an end user within a local exchange actually pays the proper tariffed fees for local exchange access and as a direct and active participant in a scheme to avoid access charges by improperly diverting access traffic into the local exchange.

IV. CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission take the action described herein.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

/s/ Timothy M. Boucher

By: Craig J. Brown
Robert B. McKenna
Timothy M. Boucher
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6608

Its Attorneys

November 10, 2005

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System, 2) served, via e-mail on Ms. Jennifer McKee, Pricing Policy Division, Wireline Competition Bureau at Jennifer.mckee@fcc.gov, and 3) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Ross Dino
Ross Dino

November 10, 2005

CERTIFICATE OF SERVICE

I, Richard Grozer, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed via ECFS with the Office of the Secretary of the FCC in WC Docket No. 10-60; 2) served via e-mail on Mr. Douglas Slotten, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission at douglas.slotten@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor, Best Copy & Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

April 2, 2010

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-134; 2) served via e-mail on Ms. Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau at lynne.engledow@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/Richard Grozier

August 12, 2010